LBR Bina Dinamik (M) Sdn Bhd v Malayan Banking Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D6–22–2954 OF 1999
REKHRAJ J
29 DECEMBER 1999

***Contract** — Guarantee — Banker's guarantee — Banker's guarantee was to be handed to payee upon execution of agreement — Agreement did not materialize — Banker's guarantee kept by bank's customer — Payee demanded for payment from bank under banker's guarantee — Whether bank could release payment to payee*

The plaintiff obtained a bank guarantee from the defendant in favour of a third party. The bank guarantee was to be handed over to the third party upon the execution of an agreement with the third party. However, the agreement did not materialize and the plaintiff was in possession of the bank guarantee. The third party made a demand upon the defendant to make payment to them under the bank guarantee. When the plaintiff was informed of the intended payment, the plaintiff informed the defendant that the agreement referred to in the bank guaranee was never executed and that the bank guarantee was still in the plaintiff's possession. The plaintiff then filed an action against the defendant to restrain the defendant from making any payments to the third party under the bank guarantee and requested for a declaration that the guarantee was not encashable. The plaintiff also took out an ex parte injunction to restrain the defendant from making payment of the demanded sum under the bank guarantee. The court ordered that the ex parte application be heard inter partes.

Held, allowing the application:

The injunction was granted to the plaintiff as the defendant had conceeded that the plaintiff was in possession of the original bank guarantee and the defendant informed the court that the defendant would not be paying the demanded sum to the third party. It must be borne in mind that the plaintiff was a customer of the defendant, and the defendant owed a greater duty of care not to debit the plaintiff's account purely on a demand, without first getting the original bank guarantee from the third party. The defendant would run a risk of being sued for negligence if it disregarded the plaintiff's counter-demands or elected to pay in the absence of the production of the original bank guarantee. The court thus granted the injunction to maintain the status quo pending the hearing of the writ action on the second prayer for the declaratory order (see pp 49I–50C).

[Bahasa Malaysia summary

Plaintif telah memperoleh satu jaminan bank daripada defendan yang menyebelahi pihak ketiga. Jaminan bank tersebut sepatutnya telah diserahkan kepada pihak ketiga selepas perjanjian dimasuki dengan

pihak ketiga tersebut. Bagaimanapun, perjanjian tersebut tidak menjadi kenyataan dan plaintif memegang jaminan bank tersebut. Pihak ketiga telah membuat satu tuntutan ke atas defendan untuk membuat pembayaran kepada mereka di bawah jaminan bank tersebut. Apabila plaintif dimaklumkan mengenai bayaran yang dicadangkan, plaintif memaklumkan defendan bahawa perjanjian yang dirujuk di dalam jaminan bank tersebut tidak terlaksana dan bahawa jaminan bank tersebut masih di dalam milikan plaintif. Plaintif kemudiannya telah memfailkan satu tindakan terhadap defendan bagi menghalang defendan daripada membuat apa-apa pembayaran kepada pihak ketiga di bawah jaminan bank tersebut dan memohon satu deklarasi bahawa jaminan tersebut tidak boleh ditunaikan. Plaintif juga telah mengemukakan satu injunksi ex parte bagi menghalang defendan daripada membuat pembayaran jumlah yang dituntut di bawah jaminan bank tersebut. Mahkamah telah memerintahkan agar permohonan ex parte tersebut didengar secara inter partes.

Diputuskan, membenarkan permohonan tersebut:

Injunksi tersebut telah diberikan kepada plaintif kerana defendan telah mengakui bahawa plaintif memiliki jaminan bank asal tersebut dan defendan telah memberitahu mahkamah bahawa defendan tidak akan membayar jumlah yang dituntut kepada pihak ketiga. Adalah perlu diingat bahawa plaintif merupakan pelanggan kepada defendan, dan defendan mempunyai kewajipan berjaga-jaga yang lebih untuk tidak mendebitkan akaun plaintif hanya berdasarkan satu tuntutan, tanpa terlebih dahulu mendapat jaminan bank asal daripada pihak ketiga. Defendan akan mengalami risiko disaman oleh sebab kecuaian jika ia tidak mengendahkan tuntutan balas plaintif atau memilih untuk membayar dengan tidak mengemukakan jaminan bank yang asal. Mahkamah oleh demikian membenarkan injunksi tersebut untuk mengekalkan status quo sementara menunggu writ tindakan didengar pada permohonan kedua untuk perintah deklarasi tersebut (lihat ms 49I–50C).]

Notes

For cases on banker's guarantee, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2252–2254.

Pramjit Kaur (*JM Chong, Vincent Chee & Co*) for the plaintiff.

Mazlinda Makhzan (*Ng Yook Woon, Andrew TC Saw & Co*) for the defendant.

Rekhraj J: The plaintiff filed a writ action against the defendant for a prayer that:

(i) the defendant by themselves or through their agents or representatives be restrained from paying and/or releasing a sum of RM211,000 or

A any other sum from the plaintiff account with the defendant bearing account number 014105-316363 and or under the bank's letter of guarantee No 97/39 dated 18 November 1997, favouring Majlis Perbandaran Melaka Bandaraya Bersejarah ('the Majlis') — the beneficiary of the guarantee.

B (ii) for a declaratory order that the said letter of guarantee 97/39 was not encashable but self-defeating as it is in the possession of the plaintiff.

The plaintiff simultaneous with the issuance of the writ took out an ex parte summons in chambers for an injunction to restrain the defendant in the payment of the demanded sum; and the court directed that that said ex parte summons be made and heard interpartes on 15 November 1999.

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The brief facts of the case are relevant for a better understanding of the plaintiff's claim. The plaintiff is a customer of the defendant bank and as such the customer had requested of its bankers to issue them a bank guarantee favouring the third party, ie the Majlis, for handing over upon the execution of a final agreement to be entered between the plaintiff on the one part and the said Majlis on the other part.

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The said purported agreement to be entered never materialized and the plaintiff then withheld and retained with themselves the said letter of guarantee No 97/39. In or around December 1997 the plaintiff then informed the defendant branch at Dayabumi (the issuing branch) to cancel the said guarantee; but only to be told by the defendant's branch representatives — Mr Oon Swee Bee and Cik Azni bte Abdul Rahman, that the plaintiff either produce from the Majlis (the beneficiary), a letter of release consenting to the cancellation or in the alternative to let the said guarantee rest to expire by effluxion of time, which would be on 17 November 1999.

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A month before the expiry of the letter of guarantee, the Majlis by its letter dated 19 October 1999, made a demand upon the defendant to pay them a sum of RM211,000 being the amount payable under the guarantee and the defendant bank upon its receipt, and by its letter dated 27 October 1999, notified the plaintiff of the demand and intimated to them that the defendant bank will be honouring the claim by debiting the plaintiff account No 014105-316363 on 29 October 1999, without any further notice on the subject matter.

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The plaintiff immediately upon the receipt of that notice of intention to pay, wrote to put them on notice not to pay for reasons:

H (i) that the contract or the agreement referred to under the bank's letter of guarantee was never executed and or formalized; and

(ii) that the original letter of bank guarantee, upon which a demand was made, still remained in possession of the plaintiff.

I At the hearing of the interpartes application, the counsel for the defendant *conceeded that by virtue of the fact that the plaintiff was now shown to be in possession of the original letter of guarantee, the bank would not pay the demanded sum to the beneficiary* and in the light of that admission or undertaking by

their counsel an injunction was granted to the plaintiff as prayed for in prayer (1) with costs of RM2,000.

It must be borne in mind that the plaintiff is a customer of the defendant bank, and the bank owes a greater duty of care not to debit its own customer's account — purely on a demand, without first calling from the person demanding the original document of title on which rests the liability to pay.

The defendant bank here runs a risk of being sued in negligence in the event it disregards the customer's counter-demands or elects to pay in the absence of the production of the original letter of guarantee.

The court thus granted the injunction to maintain the status quo pending the hearing of the writ action on the second prayer for the declaratory order.

Application allowed.

Reported by Chin En Tek